

November 12, 2014

National Freedom of Information Officer
U.S. Environmental Protection Agency
Submitted via *FOIA Online*

***Re: Freedom of Information Act Request Regarding EPA's Evaluation of
Lead Emissions from General Aviation Aircraft Engines***

Dear Freedom of Information Act Officer:

On behalf of Friends of the Earth ("FoE"), Oregon Aviation Watch ("OAW"), and Physicians for Social Responsibility ("PSR") (collectively "Joint Parties"), Earthjustice and the Environmental Law and Justice Clinic at Golden Gate University School of Law submit this request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency ("EPA" or "the Agency") FOIA regulations, set forth at 40 C.F.R. Pt. 2. This request focuses on information related to EPA's evaluation of lead emissions from general aviation aircraft engines and the extent to which these emissions cause or contribute to air pollution, which may reasonably be anticipated to endanger the public health or welfare.

The Joint Parties request a fee waiver for this request.

I. Background

On October 3, 2006, FoE submitted a petition for rulemaking ("the Petition") to EPA that sought a finding by the Agency regarding the contribution of lead emissions from general aviation aircraft engines to lead air pollution, which may reasonably be anticipated to endanger public health or welfare. EPA formally responded to the Petition on July 18, 2012 and indicated that it would continue developing "basic factual information about the levels of lead in the air at and around general aviation airports" by modeling air monitoring data and combining the results of such modeling with updated demographic information. *See* Environmental Protection Agency, *Memorandum in Response to Petition Regarding Lead Emissions from General Aviation Aircraft Piston-Engines*, July 18, 2012, sec. III, p. 5 ("EPA's Petition Response"). Thereafter, on April 8, 2013, FoE submitted FOIA Req. No. HQ-2013-005276 ("FOIA Request No. 1"), requesting documents contained in thirteen separate categories and requesting a waiver of fees for each. Initially, EPA entirely denied FoE a fee waiver for its FOIA Request. FoE appealed. In a letter dated July 3, 2013, EPA responded to FoE's Fee Waiver Appeal ("EPA Fee Waiver Appeal Response"). In that determination, EPA partially reversed its initial finding and granted FoE's fee waiver request for six categories, and affirmed its fee waiver denial for the other seven categories. *See* EPA Fee Waiver Appeal Response, p. 6. FoE retracted those seven categories from FOIA Request No. 1, and requested the immediate release of remaining documents requested.

The EPA disclosed records for FOIA Request No. 1 on August 30, 2013, September 30, 2013, and November 1, 2013. As explained by Meredith Pedde, EPA only disclosed "those records in its possession at the date the request was received, which in this case was April 8, 2013." *See* e-mail

from Meredith Pedde, Office of Transportation & Air Quality, EPA, to FoE, July 17, 2013. On November 26, 2013, FoE submitted FOIA Req. No. HQ-2014-001473 (“FOIA Request No. 2”), requesting documents contained in two information sets and requesting a waiver of fees for each. Information Set A contained six categories, and Information Set B contained seven categories for a total of thirteen categories. These categories were similar to the categories required in FOIA Request No. 1.

FoE and EPA agreed to narrow the EPA’s initial response to the request in calls and correspondence from early 2014. EPA disclosed the records responsive to the narrow scope that FoE and EPA agreed to on April 30, 2014. Other known records were deferred until FoE determined if it would request additional documents within the scope of FOIA Request No. 2. Similar to FOIA Request No. 1, EPA only disclosed those “records in its possession as of the date of the request received pursuant to 40 C.F.R. § 2.103(a)”, which was November 26, 2013. *See* letter from William J. Charmley, Office of Transportation & Air Quality, EPA, to FoE, Feb. 14, 2014. FoE has requested additional documents related to this request in October 2014. Specifically, FoE has requested all records that describe the scope of the analysis and evaluation that EPA believes is required under Clean Air Act section 231’s endangerment requirement.

II. Records Requested

For purposes of this request, the term “record” means information of any kind, including, but not limited to, documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

The Joint Parties request that EPA make available records that correspond to the following five categories:

1. All responsive records dated or created after November 26, 2013, or those that came into EPA’s possession following November 26, 2013 that summarize or describe monitoring data about the levels of lead in the air at and around general aviation airports, including all records related to the EPA’s “1-year monitoring study of 15 additional airports,” as referenced in EPA’s Petition Response, sec. III, p. 5, ¶ 2, p.6, ¶ 1, p. 9, ¶ 3, p. 12, ¶ 2.
2. All responsive records dated or created after November 26, 2013, or those that came into EPA’s possession following November 26, 2013 that summarize or describe EPA’s demographic analysis and evaluation of environmental justice among the populations residing in close proximity to airports with piston-engine aircraft activity, as referenced in EPA’s Petition Response, p.10, ¶ 4.
3. All communications and records since July 12, 2012 exchanged between the EPA and Federal Aviation Administration (“FAA”) regarding lead emissions produced by piston-engine aircraft, lead concentrations around airports, efforts to investigate or address avgas lead emissions by the EPA or other agencies, and EPA’s ongoing analysis as discussed in EPA’s Petition Response.
4. All communications and records since July 12, 2012 exchanged between the EPA and the U.S. Department of Transportation (“DOT”) regarding lead emissions produced by piston-

engine aircraft, lead concentrations around airports, and efforts to investigate or address avgas lead emissions by the EPA or other agencies, and EPA's ongoing analysis as discussed in EPA's Petition Response.

5. All communications and records since July 12, 2012 exchanged between the EPA and Congress regarding lead emissions produced by piston-engine aircraft, lead concentrations around airports, and efforts to investigate or address avgas lead emissions by the EPA or other agencies, and EPA's ongoing analysis as discussed in EPA's Petition Response.

Records of an administrative nature are not requested. Records pre-dating July 12, 2012 are not requested. Records that are publicly available are also not requested.

III. Exemptions from Disclosure

If EPA believes that certain documents are exempt from required disclosure, please exercise your discretion to disclose them nevertheless in accordance with the Attorney General's March 2009 FOIA memorandum, reiterating President Obama's directive that in "the face of doubt, openness prevails." Attorney General, Memorandum for Heads of Executive Departments and Agencies, at 1 (March 19, 2009). We expect that EPA will apply a presumption in favor of disclosure and consider that it "should not withhold information simply because it may do so legally." *Id.* Should you determine that any records may be withheld under FOIA's narrow exemptions, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the Agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure. Finally, if a document does not exist, please indicate that in your written response.

IV. A Fee Waiver is Appropriate

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), the Joint Parties request that EPA waive all fees associated with responding to this request because the Joint Parties seek this information in the public interest and will not benefit commercially from this request. As described above, EPA has previously waived fees related to FoE's prior FOIA requests asking for similar information and material.

FOIA provides that fees shall be reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). EPA's FOIA regulations contain a nearly identical requirement, 40 C.F.R. § 2.107(l)(1), and identify six factors to assess whether a requester is entitled to a waiver of fees under FOIA, *id.* § 2.107(l)(2), (3).

The Joint Parties' request complies with every factor EPA weighs in a fee waiver determination, as demonstrated below.

A. The Joint Parties' Requests for Information are in the Public Interest.

1. The Information Requested in Categories 1 and 2 is in the Public Interest.

The Joint Parties have requested EPA make available updated information for categories of documents previously requested in FOIA Request No. 1 and FOIA Request No. 2. On July 3, 2013, EPA determined that FoE had met its burden in showing that the information requested in FOIA Request No. 1 for monitoring data and demographics analysis requests were in the “public interest” and completely waived fees for all of those categories. EPA also determined that FoE had met its burden for updated information in these categories on November 27, 2013 for FOIA Request No. 2. Here, the Joint Parties are requesting updated information responsive to the identical monitoring and demographics requests, in addition to records specific to communication between EPA and FAA, DOT, and Congress.

More specifically, in waiving fees for documents requested in FOIA Request No. 1, EPA concluded:

1. That “the subject of the request concern[ed] the activities or operations of identifiable governmental activities, *i.e.*, the activities of EPA, since EPA is statutorily charged with evaluating and promulgating rules and regulations governing lead emissions from aviation aircraft pursuant to 42 U.S.C. § 7571” and “[a]ccordingly, [FoE has] made the required showing under this condition” for this prong of the fee waiver test. *See* EPA Fee Waiver Appeal Response, p. 3.
2. That the requested records “provide[s] information related to the results of EPA’s investigation of determining whether lead emissions from generation of aviation aircraft endanger public health or welfare” and that disclosure will “increase understanding on the part of the general public of EPA’s investigation and evaluation of the impacts of lead emissions from aviation on the human health and the environment.” *See* EPA Fee Waiver Appeal Response, p. 4.
3. That disclosure of the documents requested would likely contribute to the public understanding, *i.e.*, the understanding of a “reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester,” taking into account the requester’s expertise in the subject area and its “ability and intention to effectively convey information to the public.” 40 C.F.R. § 107(l)(2)(iii). *See* EPA Fee Waiver Appeal Response, p. 5 (“you have met the test for the third condition”).
4. That for monitoring data and demographics analysis “[FoE] ha[s] explained specifically how the requested information will contribute to the public’s understanding of government operations or activities to a significant extent by showing how disclosure of monitoring data about levels of lead in the air at and around general aviation airports, EPA’s development of a model to evaluate levels of lead in the ambient air, 2011 National Emissions Inventory for lead emissions from piston-engine aircraft, EPA’s demographic analysis of environmental justice among airports with piston-engine aircraft, and EPA’s 1 year monitoring study of 15 additional airports will advance public comprehension of the results of EPA’s investigation of determining whether lead emissions from . . . aviation aircraft endanger public health or welfare. The degree of public understanding of the results of EPA’s investigation will be significantly augmented by the additional knowledge concerning impacts of lead emissions from aviation on human health and the environment that will be provided to the public by the disclosed documents. [FoE] ha[s] therefore met [its] burden...” *See* EPA Fee Waiver Appeal Response, p. 5 (citing *Judicial Watch, Inc. v. DOJ*, 122 F. Supp. 2d 13, 19 (D.D.C. 2000)).

EPA stated that FoE met its burden in establishing that for categories related to monitoring data and demographic analysis, FoE met “its burden with respect to all four conditions of the public interest prong of the fee waiver test” and concluded “release of the requested documents would serve the public interest.” *See* EPA Fee Waiver Appeal Response, p. 6. Since the legal standard is the same, the information requested is the same, and EPA has already found that this information is “in the public interest” for purposes of a fee waiver, it follows that the monitoring data and demographic analysis requested meet the standard for the public interest prong of the fee waiver test.¹

In sum, the type of information requested in Categories 1 and 2 is *identical* to the information requested in revised FOIA Request No. 1 and FOIA Request No. 2 that EPA has already determined is eligible for a fee waiver. EPA should therefore waive the fees for these Categories from the instant request.

2. The Information Requested in Categories 3, 4 and 5 is in the Public Interest.

The Joint Parties have requested EPA make available information for categories of information contained in Categories 3, 4 and 5 of this request. Records describing communications between EPA and FAA, DOT and Congress are in the public interest because these categories meet each of the four factors EPA weighs when making a fee waiver determination, as explained below.

a. The Information Requested in Categories 3, 4 and 5 Concerns the Operations or Activities of EPA.

When determining whether a FOIA request is in the public interest, EPA first examines whether the information requested concerns “identifiable operations or activities” of the federal government with a “connection that is direct and clear,” and “not remote.” 40 CFR § 2.107(l)(2)(i). EPA is a federal agency statutorily charged with evaluating and promulgating rules and regulations governing lead emissions from general aviation aircraft. *See* 42 U.S.C. § 7571. Here, the communications and data that the Joint Parties request concerns (1) EPA’s evaluation of lead emissions from general aviation aircraft engines, (2) the extent to which such emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, (3) input, direction, or sharing of data and strategies between EPA and FAA, DOT or Congress related to lead emissions from general aviation aircraft engines. 42 U.S.C. § 7571(a)(2)(B), (b). Thus, there is a direct connection between the information sought by the Joint Parties and EPA’s operations and activities. The requested records therefore directly and clearly concern “operations or activities of the government,” as they are the direct product of EPA’s operations and activities and will be used to fulfill EPA’s statutory mandate under 42 U.S.C. § 7571. *See* 40 C.F.R. § 2.107(l)(2)(i); *see also Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 107-08 (D.D.C. 2006); *Judicial Watch v. Dep’t of Transp.*, Civ. No. 02-566-SBC, 2005 WL 1606915, at *3-4 (D.D.C. July 7, 2005).

Moreover, the Joint Parties are requesting the records with reasonable specificity. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313 (D.C. Cir. 2003) (quoting *Larson v. Cent. Intelligence Agency*, 843 F.2d 1481, 1483 (D.C. Cir. 1988)) (to satisfy the first prong of a fee waiver request, government operations or activities must only be identified with “‘reasonable specificity’—all that FOIA requires”). Here, the Joint Parties request records related to communications and activities to

¹ The Joint Parties hereby incorporate FoE’s May 6, 2013 FOIA Appeal of Fee Waiver Denial and the arguments made therein that pertain to *exactly the same categories of documents* requested here.

which EPA has referred during conference calls and meetings with FoE. Specifically, because 42 U.S.C. § 7571 requires consultation, we are aware that the EPA has been involved in discussions with DOT, generally, and the FAA, more specifically, regarding efforts by the EPA and other agencies to address lead emissions by general aviation aircraft. *See, e.g.,* Unleaded AVGAS Transition Aviation Rulemaking Committee, *FAA UAT ARC: Final Report* 8, 38 (2012), available at http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Avgas.ARC.RR.2.17.12.pdf. Further, the Joint Parties are aware that EPA has also received comments from Congress related to its lead emissions investigation. *See, e.g.,* Comment by Congressman Don Young, EPA-HQ-OAR-2007-0294-0362. Since EPA coordination with other agencies on lead emissions is directly related to the activities described in this and prior FOIA requests, there is a direct and “reasonably specific link” between the activities and operations of EPA and the records requested here.

b. The Disclosure of the Joint Parties’ Request for Information by EPA is “Likely to Contribute” to an Understanding of Government Operations and Activities.

EPA next examines whether disclosure of the records in the Joint Parties’ request is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this factor, the disclosed records “must be meaningfully informative” and “likely to contribute . . . to an increased public understanding of those operations or activities.” *Id.* Information that is not “already . . . in the public domain, in either a duplicative or a substantially identical form” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, the records that the Joint Parties’ request will provide the Joint Parties and the public with meaningful information related to EPA’s investigation of determining whether lead emissions generated by aviation aircraft endanger public health or welfare. Communications between EPA and FAA, DOT and Congress will help the Joint Parties and the public understand EPA’s ongoing evaluation of lead emissions from general aircraft and to what extent these emissions endanger health and welfare, or contribute to air pollution. These records will also disclose any plans or actions taken by other government agencies that have been or will be directly used to evaluate or influence the ongoing EPA lead emission investigation. This is especially important given EPA’s requirement to coordinate with DOT and FAA under 42 U.S.C. § 7571. Disclosure of these records will ultimately increase public understanding of EPA’s investigation and assessment of the impact of lead emissions from aviation on human health and the environment. *Rossotti*, 326 F.3d at 1313-1314.

This information will also allow the Joint Parties and the public to evaluate whether EPA is properly acting under its statutory mandate. *See* 42 U.S.C. § 7571; *see also U.S. Dep’t of Justice v. Reporters Comm. For Freedom Of The Press*, 489 U.S. 749, 773 (1989) (quoting *Env’tl. Protection Agency v. Mink*, 410 U.S. 73, 80 (1973) (J. Douglas, dissenting)) (FOIA’s purpose concerns citizens’ rights to be informed about “what their government is up to” and “[o]fficial information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose . . .”). Here, the Joint Parties seek disclosure of records that concern not only public health or welfare but, specifically, records and communications related to EPA’s fulfillment of its mandate under the Clean Air Act. 42 U.S.C. § 7571.

Further, the Joint Parties have not requested any information that is already publicly available. Thus, the requested information is not “duplicative” or otherwise available in “substantially identical form.” 40 C.F.R. § 2.107(l)(2)(ii). Because the requested information will contribute to an understanding of EPA’s decisions regarding its statutory duties under 42 U.S.C. § 7571, and is not otherwise publicly available, the records sought are likely to contribute to an understanding of

government operations and activities. As a result, the Joint Parties satisfy the second public interest factor because the requested information in Categories 3, 4 and 5 will contribute to an understanding of EPA's decision-making under its statutory duties, and is likely to contribute to an understanding of EPA's evaluation of the subject in coming to a determination.

c. Disclosure of the Records Requested by the Joint Parties Will Help Inform the General Public.

To determine whether a fee waiver is justified, EPA's third consideration is whether the "contribution to an understanding of the subject by the public is likely to result from disclosure" and states that the "disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 2.107(l)(2)(iii); *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814–15 (2d Cir.1994) ("The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject"). In addition, a "requester's expertise in the subject area and ability and intention to effectively convey information to the public" is considered under this requirement. 40 C.F.R. § 2.107(l)(2)(iii).

First, a reasonably broad audience is interested in the risks posed by the largest source of airborne lead emissions in the country. This "broad audience" is demonstrated by the over 350 comments submitted in a recent rulemaking docket related to aircraft lead emissions and the over 25,000 signatures that the Joint Parties submitted to EPA in April 2014. *See* EPA Rulemaking Docket No. EPA-HQ-OAR-2007-0294. The commenters and signatories represented a diverse spectrum of interests, including pilots, industry groups, interested states and cities, individuals living near airports, public health advocates, and environmental groups. *Id.* EPA's failure to regulate lead emissions from aircraft also has been the focus of various media reports.²

Here, release of the requested records will contribute to the public's understanding of EPA's decision-making regarding the regulation of aircraft lead emissions. EPA has estimated that 16 million people reside and 3 million children attend school in close proximity to airport facilities where lead emissions from aircraft engines are released. Members of the Joint Parties and their families, including young children, who are especially vulnerable to harm from lead exposure, live, work, play, and attend school near airports where leaded avgas is used and lead is emitted into the air. Some members live in areas near airports where lead is emitted and that EPA has classified as "nonattainment" for lead due to their failure to meet the Agency's own health-based National Ambient Air Quality Standards. The people living close to these airports have substantial interests in ensuring that any EPA decision regarding the regulation of lead emissions is made transparently and in accordance with applicable law.

Moreover, each of the Joint Parties has a history of, and expertise in, environmental and public health advocacy that will ensure that the requested information will be disseminated to the general public.

² For just a few examples, *see e.g.*, Sarah Zhang, *Leaded Fuel Is a Thing of the Past—Unless You Fly a Private Plane*, MOTHER JONES (Jan. 10, 2013 4:06 AM), <http://www.motherjones.com/blue-marble/2012/12/-private-planes-still-use-leaded-gasoline>; Cahal Milmo, *Made in Britain: The Toxic Tetraethyl Lead Used in Fuel Sold to World's Poorest*, THE INDEPENDENT (Jan. 14, 2013), <http://www-independent.co.uk/news/uk/home-news/made-in-britain-the-toxic-tetraethyl-lead-used-in-fuel-sold-to-worlds-poorest-8449967.html>; *Does the Continued Use of Lead in Aviation Fuel Endanger Public Health and the Environment?*, SCIENTIFIC AMERICAN (Sep. 3, 2012), <http://www.scientificamerican.-com/article.cfm?id=lead-in-aviation-fuel>.

FoE is an environmental advocacy organization founded in 1969, with approximately 350,000 members and activists across the nation, including more than 200,000 online activists and newsletter subscribers. FoE is dedicated to defending the environment and championing a healthy and just world by protecting against environmental degradation and promoting clean air and healthy communities. To this end, FoE has advocated for improved air quality nationwide through, among other things, environmental activism, public education, litigation, and participation in agency hearings. For the past ten years, FoE has devoted resources towards reducing pollution that results from the use of leaded fuel by aviation aircraft.³

PSR is the largest physician-led nonprofit organization in the United States working to slow, stop and reverse global warming and toxic degradation of the environment. Founded in 1961, PSR has a national network of 50,000 health professionals and concerned citizen members and e-activists, twenty-five PSR chapters in nineteen states, and roughly thirty student PSR chapters at medical and public health schools. PSR uses research analysis, collaboration and targeted communication to advocate to and educate the medical and broader health community about environmental health issues. PSR has been active in identifying and combating the effect of lead exposure, particularly the effects on children, through its research, advocacy, and educational activities.⁴

OAW is an organization dedicated to research, education and advocacy on behalf of the public interest and public welfare regarding aviation issues. OAW seeks to enhance and protect the quality of life for Oregon residents by eliminating the adverse impacts of aviation activity, as well as achieve a transparent, accountable and sustainable aviation system that neither disregards nor diminishes the environment, livability, health or well-being of current and future generations of Oregon residents. OAW provides information on aviation policy in Oregon and nationally, and shares its experiences dealing with these issues. To further these goals, OAW has gathered and written numerous articles on the subject of lead pollution from piston craft airplanes, and has filed requests and motions with local airports to install monitoring equipment to further show the effects and dangers of leaded avgas. OAW communicates regularly with a broad base of local supporters, elected officials and environmental organizations to keep the public apprised of current aviation issues. OAW is active at the local level in ensuring decision-makers take into account the health and well-being of communities who live near airports throughout Oregon.

In light of its substantial experience with air quality, public education, litigation, and the dissemination of information, the Joint Parties are well prepared to analyze and evaluate the records received pursuant to this request and assess them in the context of the statutory mandates of the Clean Air Act. To this end, the Joint Parties have the expertise, “ability and intention” to convey this information to the public and, specifically, persons interested in the subject. 40 C.F.R. § 2.107(l)(2)(iii). This is sufficient to satisfy this prong of the test under the plain language of the regulation. *See also Carney*, 19 F.3d at 814–15 (the “[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large” and need only reach “a reasonably

³ For example, in 2003, FoE initially raised the issue of the potential of lead emissions from the use of leaded gasoline in general aviation aircraft engines to cause or contribute to endangerment of public health or welfare. In 2006, FoE petitioned EPA for a formal rulemaking with respect to lead emissions. In 2011, FoE filed a complaint seeking to compel EPA to make an endangerment finding.

⁴ For example, PSR played a key role in the passage of the National Housing Bill of 1992, which significantly reduced the amount of lead in drinking water consumed in the United States. More recently, PSR’s Los Angeles chapter co-sponsored California’s Childhood Lead Poisoning Prevention Act of 2007, which sought to increase the number of children tested for lead poisoning by utilizing the state’s immunization program.

broad audience of persons interested in the subject”).

Furthermore, the Joint Parties will take numerous steps to disseminate the requested information to the public, and have demonstrated and longstanding capacity to do so. The Joint Parties will distribute this information to their more than 400,000 combined members and activists through their websites, email lists, mailers, and direct communications, all of which are available free of charge to interested parties. In addition, the Joint Parties will disseminate and promote this information via social media to FoE and PSR’s more than 204,000 combined followers. The Joint Parties will also make this information available to traditional media through direct communication to journalists; press releases; telephone-based and traditional press conferences; phone calls and emails to reporters; media interviews; newsletters both posted to our respective websites and mailed and emailed to interested members of the public and media, social media accounts; and testimony at public meetings. The Joint Parties disseminate all of this information free of charge to the public.

This type of dissemination has been held sufficient to satisfy this prong of the fee waiver determination. *See Judicial Watch, Inc. v. Gen. Servs. Admin.*, CIV.A. 98-2223 (RMU), 2000 WL 35538030, at *9 (D.D.C. Sept. 25, 2000) (holding that an organization satisfied FOIA’s requirement that information be disseminated to a reasonably broad segment of the public where the organization had established history of disseminating information and proposed to post disclosed information for public review on its website); *see also D.C. Technical Assistance Org., Inc. v. U.S. Dep’t of Hous. & Urban Dev.*, 85 F. Supp. 2d 46, 49 (D.D.C. 2000) (“In this Information Age, technology has made it possible for almost anyone to fulfill” FOIA’s dissemination requirement); *see also Or. Natural Desert Ass’n v. U.S. Dep’t of Interior*, 24 F. Supp. 2d 1088, 1095–96 (D. Or. 1998) (relying on *Friends of the Coast Fork v. U.S. Dep’t of the Interior*, 110 F.3d 53, 55–56 (9th Cir. 1997)) (held organization established a prima facie case that “contribution to public understanding” was significant where organization sought a fee waiver request for monitoring data and gave a “lengthy articulation of its reasons for requesting the information,” explained “what it would do with that information,” “how [it] would disseminate” the information and “to whom”).

Because the Joint Parties are particularly informed and able to disseminate this information to a sufficiently broad and interested audience, disclosure of the requested information will “contribut[e] to an understanding of the subject by the public.” 40 C.F.R. § 2.107(l)(2)(iii). As a result, the Joint Parties thus satisfy the third factor used to determine whether a fee waiver is justified for Categories 3, 4 and 5.

d. The Information Requested by the Joint Parties Will Contribute “Significantly” to Public Understanding of Government Operations and Activities.

The fourth factor EPA considers is whether the records requested in Categories 3, 4 and 5 “is likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv). *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

The records the Joint Parties request in Categories 3, 4 and 5 will contribute “significantly” to the ongoing public conversation about the need to protect the public from the adverse health impacts attributable to lead exposure from this significant source or airborne lead emissions by disclosing

communications and coordination between the EPA and other agencies that is otherwise not currently available. *See id.* at 205–06 (“availability of the requested information prior to disclosure must also be considered Here, the information requested is not even in the public domain; it does not have an existing ‘threshold level of public dissemination,’ as the public currently has no access to it, accordingly current availability of the information is not a bar to the plaintiff’s fee waiver request”).

These records will disclose any plans or actions taken by other government agencies that have been or will be directly used to evaluate or influence the ongoing EPA lead emission investigation. Due to the fact that the currently unavailable communications requested will significantly enhance the public’s understanding of EPA’s actions and decision-making regarding lead emissions from piston-engine aircraft, the Joint Parties satisfy the fourth factor used to determine whether a fee waiver is justified for Categories 3, 4 and 5. Indeed, “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d. at 1312 (quoting 132 CONG. REC. 27,190 (1987) (Sen. Leahy)).

In sum, the information requested in Categories 3, 4 and 5 meets all four prongs of the public interest test under FOIA and EPA’s guiding regulations.

B. The Joint Parties have No Commercial Interest in the Requested Information.

EPA regulations identify two factors in assessing whether the requested information is primarily in the commercial interest of the requester and thus less likely entitled to a fee waiver. EPA assesses both the “existence and magnitude of a commercial interest,” and whether the disclosure is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(i)-(ii).

Here, each of the Joint Parties are tax-exempt 501(c)(3) environmental and public health advocacy organization. The Joint Parties have no commercial, trade, or for-profit interests in the information requested. The Joint Parties seek to use this information solely to inform the public about EPA’s actions regarding lead emissions from general aviation aircraft engines and to support advocacy efforts around protecting the public from health risks posed by exposure to ambient lead. The Joint Parties plan to disseminate this information free of charge to the public. Thus, the Joint Parties have no relevant commercial interest, and the request is entirely in the public interest. Given the non-profit nature of the Joint Parties, their limited financial resources, and all of the foregoing reasons, a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

Further, in EPA’s Response to FoE’s Fee Waiver Denial Appeal, EPA acknowledged that FoE met these prongs for FOIA Request No. 1 because “the request (was) not primarily in the commercial interest of the requester.” *See* EPA Fee Waiver Appeal Response, p. 6. Thus, EPA has already determined that the Joint Parties’ request for information in Categories 1 and 2 is not in the Joint Parties’ commercial interest, and that determination should not change with respect to the Joint Parties’ request for information in Categories 3, 4 and 5.

C. The Joint Parties’ Request for Information Warrants a Fee Waiver.

The Joint Parties have successfully met each factor EPA uses to determine whether a fee waiver is justified under FOIA for all five Categories requested. The requested records concern the activities or operations of government; are not requested for commercial purposes; and will provide the public with meaningful information that addresses EPA’s evaluation of ambient lead emissions from general aviation aircraft engines under its statutory mandate. Given that FOIA’s fee waiver provision

is to be “liberally construed in favor of waivers for noncommercial requesters” such as the Joint Parties, the forgoing reasons demonstrate that a fee waiver is clearly warranted. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). Thus, the Joint Parties respectfully request EPA waive fees for all FOIA categories requested.

V. Instructions for Record Delivery

To the extent that the requested records are available in a readily-accessible electronic format, the Joint Parties prefer to receive records electronically, either by e-mail or on a CD. If electronic copies are unavailable, the Joint Parties will accept paper copies. Please send the requested records to Deborah Behles at the address listed below. We trust that, in responding to this request, EPA will comply with all relevant deadlines and obligations set forth in FOIA and in EPA’s FOIA regulations. In the event that EPA concludes that some of the records requested above may already be publicly available, the Joint Parties request that EPA direct us to their respective locations.

Thank you for your assistance processing this request. Please contact Deborah Behles if you have any questions.

Best Regards,

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